ORIGINAL

83-6381

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. _____

GILL PARKER, ET AL.,

PETITIONERS

V.

JOHN R. BLOCK, Secretary of the
United States Department of Agriculture

and

CHARLES ATKINS, Commissioner of the
Massachusetts Department of Public Welfare,

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEALS FOR THE
FIRST CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. May a court of appeals reverse the grant of a prospective injunction because the enjoined party was not found to have acted in bad faith?

2. Did the Court of Appeals for the First Circuit violate the command of the Food Stamp Act by refusing to permit the restoration of benefits withheld without the prior, adequate notice required by the Act?

3. By reversing both the award of prospective injunctive relief and the restoration of wrongfully withheld benefits, did the Court of Appeals for the First Circuit render meaningless plaintiffs' statutory right to prior, adequate notice?

PARTIES

The action was commenced by Karen foggs, Gill Parker, Cecelia Johnson and Constance Smith as a class action on behalf of approximately 16,500 food stamp households in the State of Massachusetts. The action was certified as a class action on December 17, 1981. (A 59)

Karen Foggs, who was one of the named plaintiffs, had decided that she no longer wishes to participate as a named plaintiff in this action and has therefore been deleted from the caption for purposes of this petition for certiorari.

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OPINIONS BELOW

The opinions below of the court of appeals and district court have not been officially reported as of the date of this Petition.

GROUNDS UPON WHICH JURISDICTION OF THIS COURT IS INVOKED

Jurisdiction to review the judgment of the Court of Appeals for the First Circuit by writ of certiorari is conferred upon this Court by 28 U.S.C. §1254(1). The judgment sought to be reviewed was entered on December 7, 1983 at 9:30 A.M. On February 9, 1984 petitioners moved for an extension of time to file a petition for rehearing before the Court of Appeals for the First Circuit. That motion has not yet been acted upon.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THIS CASE

This case involves the following statutes and regulations:

Food Stamp Act of 1977, Pub. L. No. 95-113, §1301(11)(e)(11), 91 Stat. 972 (1977):

> (e) The State plan of operation required under subsection (d) of this section shall provide among such other provisions as may be required by regulation
>
> ...
>
> (11) for the prompt restoration in the form of coupons to households of any allotment or portion thereof which has been wrongfully denied or terminated;

7 U.S.C. §§2020(e)(10) and (11):

> (e) The State plan of operation... shall provide...
>
> (10) for the granting of a fair hearing and a prompt determination thereafter to any household aggrieved by the action of the State agency under any provision of its plan of operation as it affects the participation of such household in the food stamp program or by a claim against the household for an overissuance: Provided, That any household which timely requests such a fair hearing after receiving individual notice of agency action reducing or terminating its benefits within the household's certification period shall continue to participate and receive benefits on the basis authorized immediately prior to the notice of adverse action until such time as the fair hearing is completed and an adverse decision rendered or until such time as the household's certification period terminates, whichever occurs earlier, except that in any case in which the State agency receives from the household a written statement containing information that clearly requires a reduction or termination of the household's benefits, the State agency may act immediately to reduce or terminate the household's benefits and may provide notice of its action to the household as late as the date on which the action becomes effective;
>
> (11) upon receipt of a request from a household, for the prompt restoration in the form of coupons to a household of any allotment or portion thereof which has been wrongfully denied or terminated, except that allotments shall not be restored for any period of time more than one year prior to the date the State agency receives a request for such restoration from a household or the State agency is notified or otherwise discovers that a loss to a household has occurred;

7 U.S.C. §2023(b):

> (b) In any judicial action arising under this chapter, any food stamp allotments found to have been wrongfully withheld shall be restored only for periods of not more than one year prior to the date of the commencement of such action, or in the case of an action seeking review of a final State agency determination, not more than one year prior to the date of the filing of a request with the State for the restoration of such allotments or, in either case, not more than one year prior to the date the State agency is notified or otherwise discovers the possible loss to a household.

7 C.F.R. §273.12(e)(2)(ii):

> (ii) A notice of adverse action is not required when a household's food stamp benefits are reduced or terminated as a result of a mass change in the public assistance grant. However, State agencies shall send individual notices to households to inform them of the change. If a household requests a fair hearing, benefits shall be continued at the former level only if the issue being appealed is that food stamp eligibility or benefits were improperly computed.

STATEMENT OF THE CASE

This class action was filed in the United States District Court for the District of Massachusetts in December, 1981 on behalf of more than 16,000 food stamp recipients. Plaintiffs challenged the contents and form of the notice used by the Massachusetts Department of Public Welfare (state defendant) to reduce or terminate their food stamp benefits because of a two percent reduction in the program's earned income disregard. Pub. L. No. 97-35, §106 (1981), 7 U.S.C. §2014(e).

Plaintiffs sought and obtained a temporary restraining order enjoining the terminations and reductions scheduled for December, 1981. The state defendant then issued a new notice announcing the reduction of the benefits of the class for January, 1982. In late December, plaintiffs moved to enjoin the reductions and terminations based upon this new notice, but that motion was denied orally by the District Court on December 31, 1981 and the reductions went into effect on January 1, 1982. Plaintiffs then moved for a preliminary injunction which was consolidated with the trial on the merits.

Following a two day trial, the district court (Freedman, J.) found that the notice had not afforded the plaintiffs due process because it: did not tell them if their benefits were to be terminated or merely reduced, and if the latter, by how much; did not give them sufficient information to determine if an error had been made in their case; was untimely; and was incomprehensible to many of its recipients due to its difficult language and the quality and size of its print. (Order of March 24, 1983, ¶1; Appendix 21-22) (hereafter A __). In addition, the court found that the notice did not comport with the requirements of the Food Stamp Act itself, 7 U.S.C. §2020(e)(10). (Findings of Fact and Conclusions of Law, Conclusion 22; A 57). Accordingly, the district court restored to the plaintiffs all food stamp benefits lost pursuant to the invalidated notice, enjoined the Department from issuing future termination or reduction notices that did not contain at least the old benefit amount, new benefit amount and sufficient information

to determine whether or not a mistake had been made, and ordered the Department to draft and have approved by the court regulations creating standards for comprehensibility and legibility of all such future notices. (Order of March 24, 1983, ¶¶3 and 5; A 22-24)

Both the Commissioner of Public Welfare and the Secretary of the United States Department of Agriculture appealed the decision to the First Circuit Court of Appeals. That court affirmed the finding of the district court that the notice in question did not comport with the requirements of either due process or §2020(e)(10). However, finding that restoration of the lost food stamp benefits would constitute a windfall to the plaintiffs in light of Congress' intent to reduce those benefits, the court reversed that part of the relief afforded by the district court. (A 16) In addition, because the court felt the defendants had not acted in bad faith, it reversed the district court's entire award of prospective relief. (A 18) In lieu of the relief ordered in the district court, the First Circuit remanded the case with instructions that the Department search its files, accurately determine which recipients' reductions or terminations had been incorrect, and by how much, and return to those recipients the benefits ascertained to have been improperly withheld. (A 17) The court's judgment entered on December 7, 1983.

BASIS FOR JURISDICTION IN THE DISTRICT COURT OF MASSACHUSETTS

Jurisdiction in the United States District Court was premised upon 28 U.S.C. §§1331, 1343(3), and 1361.

REASONS FOR GRANTING THE WRIT

POINT I

THE DECISION OF THE COURT OF APPEALS TO REVERSE THE PROSPECTIVE INJUNCTIVE RELIEF AWARDED BY THE DISTRICT COURT CONFLICTS WITH THIS COURT'S OPINION IN PENNHURST, ETC. V. HALDERMAN, 52 LW 4155 (1984), AND IMPERMISSIBLY INTRUDES ON THE DISTRICT COURT'S DISCRETION

Following the two day trial at which employees of the Massachusetts Department of Public Welfare (the state defendant) offered time pressures, Department workload problems and computer chaos as justifications for the food stamp notice at issue here, the district court granted the plaintiffs a prospective injunction mandating that future notices of reduction or termination of food stamp benefits contain, at a minimum, certain recipient-specific information.[1/] The court issued its order only after concluding, inter alia, that "the time pressures that the D.P.W. felt regarding the November notice were self-created" and that "[t]he governmental interest in not providing an informative notice is minimal at best." (Findings of Fact and Conclusions of Law, Conclusions 15 & 16; Appendix at 54 & 55) (hereafter Finding __ or Conclusion __; A __)

The district court also ordered the state defendant to draft regulations containing specific standards to ensure that future food stamp notices of reduction or termination would be written and printed so as to be understandable to recipients of those notices. (Order of March 24, 1983,

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1/ The district court's order required that all future notices contain at least the recipient's old benefit amount, new benefit amount, and sufficient information to determine if an error had been made by the Department. (Order of March 24, 1983, ¶5; A 23).

¶3; A 22) Again, the court's order followed its conclusion that "the language and the format of the notice was [sic] not reasonably designed to convey the information contained." (Conclusion 20; A 56)

Upon appeal, the First Circuit Court of Appeals purported to affirm[2/] the district court's conclusion that the notice at issue was constitutionally and statutorily inadequate. Nonetheless, that court concluded:

> Although the state's notice was inadequate, we find nothing in the record to indicate that the Department acted in bad faith. We have no reason to doubt that the state will strive to provide constitutional notice in the future... Accordingly, we conclude that the district court placed an improper and unnecessary burden upon the Department when it specified the form of future notices and required the submission and promulgation of new notice regulations. (A 18)

This stated basis for reversing the injunctive relief afforded by the district court demonstrates a clear misperception of the requirements for and purposes of injunctions, as they have been set forth in the decisions of this Court.

In the recent case of Pennhurst State School and Hospital v. Halderman, U.S. , 52 LW 4115, 4160 n.17 (1984) (hereafter Pennhurst II),[3/] a divided Court nonetheless was unanimous

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[2/] However, the Court is respectfully referred to Point III, infra, wherein petitioners contend that by reversing all of the relief afforded the "victorious" plaintiffs, the court of appeals accomplished a de facto if not de jure reversal of the district court opinion.

[3/] Following the Court's decision in Pennhurst II, plaintiffs requested an extension of time to petition for rehearing. That motion is still under advisement by the First Circuit.

in finding that:

> It is of course true, as the dissent says, that the finding below that Petitioners acted in good faith... does not affect whether an injunction might be issued against them by a court possessed of jurisdiction.

This observation logically follows from the basic tenet that "the historic injunctive process was designed to deter, not to punish." Hecht v. Bowles, 321 U.S. 321, 329 (1944). Because punishment of a civil wrongdoer is not the goal, his lack of bad faith is not material to whether an injunction issued against him may be reversed on appeal.[4/]

Rather, an injunction is designed to deter future misconduct and to protect the person in whose favor it has been issued. It is this critical distinction that the court of appeals failed to recognize, but it is one that this Court has often expressed. In Califano v. Yamasaki, 442 U.S. 682, 705 (1979), it was noted that an injunction against the Secretary of the Department of Health, Education and Welfare was appropriate to insure future compliance with an order that he provide pre-recoupment waiver hearings to Social Security recipients, even though his duty to comply was thereby enforceable by contempt and the likelihood that he would not voluntarily do so was deemed to be a "remote eventuality". The Court thus was not focusing on whether or not the Secretary might strive to comply in the future, but rather on the protection that would be available to the plaintiffs should he fail to do so.

4/ The approach of the court of appeals in regard to bad faith appears particularly schizophrenic in this case. While specifically finding no evidence of bad faith in the state defendant's rendering of the disputed food stamp notices, it nonetheless posited the potential for such bad faith action by the very same defendant as a rationale for denying to the plaintiffs restoration of the benefits wrongfully withheld from them. (A 16)

It was this same focus that lead the Court to state in Hecht v. Bowles, 321 U.S. 321, 327 (1944), that an injunction may be appropriate even where the defendant has ceased the complained-of practice. And in Cavanaugh v. Looney, 248 U.S. 453, 456 (1919), while recognizing that the grant of an injunction was an extraordinary remedy, the Court concluded that one would properly issue where necessary "in order effectually to protect property rights against injuries otherwise irremediable."

In reversing the injunctions granted by the district court in this case, the court of appeals left the recipients with no protection from future violations of their right to timely and adequate notice before their food stamp benefits may be reduced or terminated. The only relief left intact upon appeal was the declarations entered by the district court. But what is the plaintiffs' remedy should those declarations be violated? The court of appeals found that they are not entitled to restoration of the benefits withheld pursuant to an invalid notice (Point II). If an injunction is not now entered, recipients will thus be in no better position the next time they receive inadequate notice than they were this first time.[5/] That being the case, it is difficult to discern in what meaningful way the harm that

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5/ It is this aspect of the injunction awarded by the district court, i.e., protection of recipients of food stamps from future inadequate notices, that the court of appeals seems to have failed to appreciate. Its reliance on the absence of a showing of bad faith by the state defendant demonstrates that it was improperly viewing the injunction as a punitive measure, not a protective one.

they suffered has been redressed in this case or deterred from reoccurring.

Consequently, the court of appeals can be seen to have acted pursuant to a misguided concept of the function of injunctions in affording relief in cases such as this one. It substituted its immaterial finding of good faith and unsubstantiated confidence that the state defendant would henceforth strive to comply for the district court's judgment that an injunction was necessary to protect the future interests of the petitioners.

In addition to evincing a misunderstanding of the role of injunctions, the action of the court of appeals impermissibly intruded upon the broad discretion afforded a trial court to fashion a remedy once it has found a violation of the law. In Lemon v. Kurtzman, 411 U.S. 192, 200 (1973), a case involving a violation of the First Amendment, it was stated that:

> In shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow.6/ [footnote added]

The narrow scope of review derives from the nature of the task undertaken by the district court in exercising its discretion. It "balances the conveniences of the parties and the possible injuries to them according as they may be affected by granting or withholding of the injunction" in order to "arrive at a nice adjustment and reconciliation

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6/ While Lemon v. Kurtzman arrived at this Court with the petitioners claiming that the district court should have awarded them more relief, the principles enunciated there surely apply equally when the district court has exercised its discretion to give the plaintiffs that which they sought.

between the competing claims." Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982).

In the present case, the district court did balance the equities as it was supposed to do. It made specific findings that administratively it was both feasible and beneficial for the state defendant to issue notices that complied with the requirements of the injunctions. (Findings 85 and 86; A 45) It also found that the interest of the plaintiffs in receiving meaningful food stamp notices of reduction or termination was substantial. It weighed these considerations and determined that injunctions were appropriate to protect the plaintiffs. Nevertheless, the district court entered the least intrusive injunctions necessary under all the circumstances. It prescribed only the minimum requirements of future food stamp notices of reduction or termination, leaving the state defendant free to define the overall contours of such notices. Further, the district court merely ordered the state defendant to establish standards for the form and comprehensibility of future notices; it did not dictate in any way what those standards should be, although it did reserve to itself the right to make certain that the promulgated guidelines were minimally adequate.

Such a balanced approach to relief by a court of equity should not be lightly reversed. Certainly to do so upon the surmise that the enjoined party will strive to act legally in the future is completely inappropriate; for such an action substitutes the reviewing court's intuition for the hard weighing of facts, including the demeanors of the parties,

undertaken by the trial court. When such a reason for intruding on the discretion of the district court is compounded by a misplaced reliance on the fact that the enjoined party did not appear to act in bad faith, the reversal of injunctive relief not only oversteps the appropriate bounds of appellate review, but squarely conflicts with this Court's statement of the law in Pennhurst II. Because the First Circuit Court of Appeals in this case did overstep its proper appellate authority, and did so based upon a view of the law that now directly conflicts with the position articulated in Pennhurst II, this Court should grant review and reinstate the relief afforded by the district court.

POINT II

THE FIRST CIRCUIT'S REVERSAL OF THE RESTORATION OF BENEFITS WITHHELD PURSUANT TO A NOTICE THAT VIOLATED THE REQUIREMENTS OF THE FOOD STAMP ACT CONTRAVENES THE EXPLICIT REMEDY PROVIDED BY CONGRESS

The Food Stamp Act has long required "the prompt restoration... to households of any allotment or portion thereof which has been wrongfully denied or terminated." Pub. L. No. 95-113, §1301(11)(e)(11), 91 Stat. 972 (1977). This provision was amended in 1981 to limit the restoration of wrongfully withheld benefits to a period of one year prior to notification to the agency or commencement of a judicial action challenging the withholding. Pub. L. No. 97-98, §1320 (1981); 7 U.S.C. §§2020(e)(11), 2023(b).[7/] The legislative history surrounding the passage of the 1981 amendments indicates that Congress was restricting the availability of an already existing remedy. Report of the House Committee on Agriculture, Hse. Rep. No. 97-106, 97th Cong.,

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7/ Public Law 97-98, §1388 (1981) (set out as a note to 7 U.S.C.A. §2012) provided that the 1981 amendments would become effective on such dates as the Secretary of Agriculture might prescribe. Following almost one year of inaction by the Secretary, Congress revised these effective dates in Pub. L. 97-253, §192(b)(1982). This section provided that the 1981 amendments would take effect "on the earlier of the date of enactment of this subtitle [September 8, 1982] or the date on which such amendments become effective pursuant to section 1338 of such Act." The Secretary promulgated regulations implementing these provisions on April 19, 1983 with an effective date of May 19, 1983. 7 C.F.R. §273.17(a); 48 Fed. Reg. 16828-31 (Apr. 19, 1983).

Plaintiffs commenced this action in December of 1981, prior to the effective date of 7 U.S.C. §2023(b), but the judgment of the District Court was entered on March 25, 1983, well after its September 8, 1982 effective date.

1st Sess., 148-149 (1981). That this remedy of restoration of wrongfully withheld benefits was and is judicially available is clear. 7 U.S.C. §2023(b).[8/] Indeed, the mandatory language of §2023(b) suggests not only that wrongfully withheld benefits can be judicially restored but that they "shall be".

In the present case, the First Circuit held that the plaintiff class had their food stamp benefits reduced or terminated without the prior, adequate notice required by the Food Stamp Act, 7 U.S.C. §2020(e)(10); by the applicable federal regulations, 7 C.F.R. §273.12(e)(ii)(2); and by the Due Process Clauses of the Fifth and Fourteenth Amendments.[9/] (A 12-13, 15) The First Circuit appears to have concluded that if the underlying reductions or terminations

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[8/] The legislative history surrounding the passage of the Food Stamp Act of 1977, Pub. L. 95-113, demonstrates that Congress was aware of and explicitly endorsed judicial actions awarding retroactive benefits to households whose benefits had been incorrectly reduced or terminated. Hse. Rep. No. 95-464, 95th Cong., 1st Sess., 283-284, reprinted at 1977 U.S. Code Cong. & Ad. News 1978, 2219-2220. This view is further confirmed by the legislative history surrounding the 1981 amendments to the Food Stamp Act. The Report of the House Committee on Agriculture, in discussing the provisions relating to restoration of lost benefits stated:

> Currently, the Act requires the Department to restore in food stamps any household benefits which the State agency has wrongfully denied or terminated.
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> Hse. Rep. No. 97-106, 97th Cong., 1st Sess., 148-149 (1981).

[9/] In light of its holding with respect to plaintiffs' federal statutory claims, petitioners believe it was not necessary for the court to reach their constitutional claims. Califano v. Yamasaki, 442 U.S. 682, 692-693 (1979); Ashwander v. T.V.A., 297 U.S. 288, 347 (1937)(Brandeis, J. concurring).

were correct, the fact that those reductions or terminations were accomplished in violation of statutorily required procedures did not render them "wrongful". (A 16) Such a conclusion directly conflicts with a long line of decisions from this Court.

The "disregard of the command of the statute is a wrongful act..." Texas & Pacific R. Co. v. Rigsby, 241 U.S. 33, 39 (1916). Agency action "in the teeth" of a statutory or regulatory provision is "lawless". Estep v. U.S., 327 U.S. 114, 121 (1946). These general maxims have been applied by the Court in a series of cases to void agency action taken in violation of procedural rules. In U.S. ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 266-267 (1954), this Court reversed the denial of a writ of habeas corpus filed by an alien challenging the procedures employed at a deportation suspension hearing. Although suspension of deportation was a discretionary act delegated by statute to the Attorney General, he was nonetheless required to comply with the regulations he had promulgated concerning the processing of such applications.

The holding in Accardi was applied to a government employee discharge situation in Service v. Dulles, 354 U.S. 363 (1957). In invalidating the discharge the Court held:

> While... the Secretary was not obligated to impose upon himself these more rigorous substantive and procedural standards,... having done so he could not, so long as the Regulations remained unchanged, proceed without regard to them.
> Service, supra at 388.

Similarly, in Vitarelli v. Seaton, 359 U.S. 535, 544 (1959), this Court again reversed the dismissal of a government employee "[b]cause the proceedings attendant upon the petitioner's dismissal... fell substantially short of the requirements of the applicable department regulations..."[10/] In his partial concurrence, Justice Frankfurter succinctly expressed the essence of the Vitarelli and Service decisions:

> An executive agency must be rigorously held to the standards by which it professes its actions to be judged. [citation omitted] Accordingly, if dismissal from employment is based upon a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed... Therefore I unreservedly join in the Court's main conclusion that the attempted dismissal of Vitarelli ... was abortive and of no validity...
> Vitarelli, supra at 546-547

The decisions in Accardi, Service, Vitarelli, and Morton v. Ruiz establish that where the rights of individuals are at stake, it is a wrongful act for an agency to violate its

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10/ The holdings of the Vitarelli and Service cases were applied by this Court in the public assistance context in Morton v. Ruiz, 415 U.S. 199, 235 (1974). There, certain general assistance eligibility requirements were invalidated due to the failure of the Bureau of Indian Affairs to promulgate them in accordance with its regulations. The decision stated:

> Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required.

own regulations in proceeding against the individuals.[11/] It is even more serious where, as here, an agency violates the command of a federal statute or the Constitution. U.S. v. Cacerces, 440 U.S. 741, 749 (1979). The wrongful nature of such conduct is not undone because the rights violated are procedural rather than substantive. Vitarelli, 359 U.S. at 540; Service, 354 U.S. at 388; Accardi, 347 U.S. at 268; see also Morton v. Ruiz, 415 U.S. at 235. Nor does it cease to be wrongful because the substantive result sought to be reached might nevertheless have been correct.[12/] Service, 354 U.S. at 373; Accardi, 347 U.S. at 268; Vitarelli, 359 U.S. at 546-546; Estep v. U.S., 327 U.S. at 125.

It is beyond serious dispute that the notice requirements contained in 7 U.S.C. §2020(e)(10) are intended to safeguard important individual interests.[13/] It is also

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11/ See also Yellin v. U.S., 374 U.S. 109, 121 (1963) (reversing contempt conviction where Congressional subcommittee did not comply with its rules regarding consideration of requests to be heard in executive session).

12/ It is important to note that, because of the advance notice requirements of 7 U.S.C. §2020(e)(10), a notice of reduction or termination of food stamps benefits is in fact only a notice of a proposed reduction or termination. Thus, although a proposed action may be substantively correct (i.e. based on a correct application of the budgeting criteria to the actual facts of the affected household), the implementation of that action is never correct unless it is preceded by timely and adequate notice. It is this distinction which the First Circuit failed to grasp and which led it to conclude, incorrectly, that the inadequate notice did not result in the improper reduction or termination of benefits to the class. (A 16)

13/ See Hse. Rep. No. 95-464, 95th Cong., 1st Sess., 285-286, reprinted in 1977 U.S. Code Cong. & Ad. News 1978, 2220-2222 (noting that this section was being added so that the Act would reflect the result of this Court's decision in Goldberg v. Kelly, 397 U.S. 254 (1970)).

apparent from the text of 7 U.S.C. §2020(e)(10) that, in the absence of the required notice, benefits can be neither reduced nor terminated.[14/] Therefore, the benefits of the plaintiff class which were withheld by the defendants in violation of the explicit command of §2020(e)(10) were wrongfully withheld. That being so, plaintiffs were entitled to "the prompt restoration" of those benefits. Food Stamp Act of 1977, Pub. L. No. 95-113, §1301(11)(e)(11), 91 Stat. 971 (1977) (current version at 7 U.S.C. §§2020(e)(11) and 2023(b)).

Because the First Circuit opinion contravenes this Court's decisions in Vitarelli, Service and Accardi, and ignores the relief expressly authorized by Congress, this Court should grant the plaintiffs' petition for review and reinstate the order of the district court.

14/ Section 2020(e)(10) specifically provides:

> ...[t]hat any household which timely requests such a fair hearing after receiving individual notice of agency action reducing or terminating its benefits... shall continue to participate and receive benefits on the basis authorized immediately prior to the notice of adverse action...

Obviously if benefits cannot be reduced or terminated even after a household receives notice if the household requests a fair hearing, they cannot be reduced or terminated before, or without, the receipt of notice. Both the district court and First Circuit so held.

POINT III

IN NOMINALLY AFFIRMING THE DECISION OF THE DISTRICT COURT BUT REVERSING ALL THE EFFECTIVE RELIEF GRANTED, THE COURT OF APPEALS SO DEPARTED FROM ACCEPTED JUDICIAL PROCEDURES AS TO CALL FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION

As is set forth fully in Points I and II of this Petition, plaintiffs contend that the court of appeals was unjustified in reversing either the prospective injunctive relief or the restoration of wrongfully withheld food stamps benefits granted by the district court. Nonetheless, had the court of appeals only removed one of those remedies, plaintiffs could not now accurately characterize that action as a broad departure from accepted judicial procedures. However, by reversing both of those forms of relief and leaving intact only the district court's declarations, the First Circuit emasculated the plaintiffs' statutory right to prior adequate notice to such a degree that the right is now no more than a "form of words". Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (Holmes, J.). Pursuant to the decision of the court of appeals, food stamp recipients have the statutory right to prior adequate notice of proposed food stamp reductions or terminations, but they have no right to restoration of any benefits withheld without such a notice. Nor, according to the First Circuit opinion, may the recipients have the protection of an injunction designed to deter any future violation of that statutory right. See Califano v. Yamasaki, 442 U.S. 682, 705 (1979). As matters now stand, a future violation of the district court's declarations

would appear to dictate no different outcome than the violation of the statute here. In the absence of bad faith by the state defendant, recipients would still be left with no current remedy nor future protection. Thus, tomorrow's illegal conduct would once again become yesterday's irremediable act. Our system of jurisprudence will not and should not abide such a result.

The concept that rights once recognized should be afforded some remedy is an ingrained one in our society. Often, where a statute has provided a right but no explicit remedy, this Court has been willing to fashion one. E.g., Texas and N.O.R. Co. v. Brotherhood of Ry. and Steamship Clerks, 281 U.S. 548 (1930); and Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969). And where the Court has been unable to find that a statute was intended to provide an individual remedy to a given plaintiff, it has done so through a cause-of-action analysis. Cort v. Ash, 422 U.S. 66 (1975). It has not been the Court's practice to recognize an individual cause of action but nonetheless deny all meaningful relief. In fact, much of the analysis in past decisions has interchangeably referred to implied causes of action as implied remedies. See e.g., Cannon v. University of Chicago, 441 U.S. 677, 690 n.12, 698 (1979). This reflects the apparent assumption on the part of the Court that where there is a right and an individual cause of action, there is a remedy. Such an assumption is the heir, and somewhat limited modern expression, of the common law doctrine ubi jus ibi remedium. If a plaintiff is properly before the court and suffering a violation of a declared right, he shall have a remedy.

That plaintiffs have a valid cause of action in this case under the Food Stamp Act and 42 U.S.C. §1983 is undisputed. Further, the court of appeals affirmed the finding of the district court that the Food Stamp Act (7 U.S.C. §2020(e)(10)) provides recipients with the right to adequate notice before their benefits may properly be reduced or terminated. Moreover, the plaintiffs were not even calling upon the appeals court to utilize any inherent authority to create or afford a remedy for the defendants' violation of the law, for the statute (7 U.S.C. §2023(b)) and the district court had already done that. In this context, to withdraw from the plaintiffs all meaningful relief is to utterly ignore the discretion of the district court, the teachings of this Court regarding the assumption of a remedy, and the will of Congress that wrongfully withheld benefits be restored. 7 U.S.C. §2023(b). Such a denial of relief renders the language of §2020(e)(10) merely precatory, a result sought to be avoided by this Court whenever possible. See Cannon v. University of Chicago, 441 U.S. 677, 737 (1979) (Powell, J. dissenting). That result is even more inappropriate and egregious here, for the court of appeals achieved it by reversing a district court order which had breathed life into the words of the statute. Thus, the plaintiffs respectfully request that the Court accept their case for review and restore some meaning to the rights that they have been found to possess.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that this Court grant their petition for a writ of certiorari to the Court of Appeals for the First Circuit.

Dated: March 6, 1984

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United States Court of Appeals
For the First Circuit

No. 83-1270

KAREN FOGGS, ET AL.,

Plaintiffs, Appellees,

v.

JOHN R. BLOCK,

Defendant, Appellee.

THOMAS SPIRITO, ETC.,

Defendant, Appellant.

No. 83-1320

KAREN FOGGS, ET AL.,

Plaintiffs, Appellees,

v.

JOHN R. BLOCK,

Defendant, Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Frank H. Freedman, U.S. District Judge]

COFFIN, Circuit Judge. Defendants, the United States Secretary of Agriculture and the Massachusetts Commissioner of Public Welfare, appeal a judgment of the district court for the District of Massachusetts. The district court held that the defendants deprived the plaintiffs of property without due process of law when they reduced plaintiffs' food stamp benefits without first providing them with constitutionally adequate notice. The district court ordered restoration of benefits pending provision of adequate notice or recertification of the recipients' files. The court also ordered extensive prospective relief, including the promulgation of new state regulations governing the form of future food stamp notices. We affirm the district court's conclusion that the notice provided by defendants was unconstitutional, but finding that the district court exceeded its authority with regard to remedy, we remand.

In August, 1981, Congress amended the Food Stamp Program, 7 U.S.C. §§ 2011-2029, reducing the earned income deduction from twenty to eighteen percent. Omnibus Budget Reconciliation Act of 1981, P.L. 97-35, 95 Stat. 257 (1981). This change required state agencies to include a greater portion of recipients' earned income when calculating benefits, which had the effect of reducing the food stamp entitlement of these recipients. Plaintiffs represent over 16,000 Massachusetts food stamp recipients whose benefits were reduced or terminated in accord with this across-the-board change in federal law.

In late November, 1981, the Massachusetts Department of Public Welfare sent a notice to all food stamp recipients with earned income

advising them that their benefits would be reduced or terminated in accord with the statutory change in the earned income deduction. The notice did not indicate the specific amount of reduction, nor did it indicate the recipient's new benefit amount. The notice, which was dated merely "11/81", also advised recipients that they had a right to request a hearing "if you disagree with this action[,]" and that their benefits would be reinstated if they requested a hearing within ten days. The notice indicated that recipients could appeal by signing and returning a card that was enclosed, or by notifying the Department by phone or in person. The notice was printed in small type across the length of a standard size computer card (approx. 3" x 7"). The notice was printed in English on one side of the card and in Spanish on the other.

Plaintiffs initiated this action in early December, 1981. They challenged the form of the November notice, alleging that it was incomprehensible to many recipients, that it contained too little information to allow a recipient to determine if a calculation error had been made, and that there was no way for a recipient to know the date by which he had to file an appeal. Contending that any benefit reduction prior to the delivery of constitutionally adequate notice would constitute deprivation of property without due process of law, plaintiffs sought restoration of benefits and other equitable relief. The district court issued a temporary restraining order on December 16, 1981 prohibiting the reduction or termination of benefits based upon the November notice. The Department of Public Welfare

subsequently restored December benefits to prior levels for all recipients with earned income.

In late December the Department sent out a second notice. That notice was printed on two computer cards. One card explained that the November notice was invalid because it had not been properly dated and that benefits had therefore been temporarily restored. That card also discussed recipients' appeal rights. The second card contained a notice virtually identical to that mailed in November, except that it was dated "December 26, 1981".[1] Again, the cards were printed in English and Spanish. Plaintiffs then filed a supplemental complaint challenging the adequacy of the December notice and sought a second temporary restraining order enjoining any

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1. This is a photocopy of the English version of the December notice:

December 26, 1981 MASSACHUSETTS DEPARTMENT OF PUBLIC WELFARE PAGE 2 185

*** IMPORTANT NOTICE - READ CAREFULLY ***

RECENT CHANGES IN THE FOOD STAMP PROGRAM HAVE BEEN MADE IN ACCORDANCE WITH 1981 FEDERAL LAW. UNDER THIS LAW, THE EARNED INCOME DEDUCTION FOR FOOD STAMP BENEFITS HAS BEEN LOWERED FROM 20 TO 18 PERCENT. THIS REDUCTION MEANS THAT A HIGHER PORTION OF YOUR HOUSEHOLD'S EARNED INCOME WILL BE COUNTED IN DETERMINING YOUR ELIGIBILITY AND BENEFIT AMOUNT FOR FOOD STAMPS. AS A RESULT OF THIS FEDERAL CHANGE, YOUR BENEFITS WILL EITHER BE REDUCED IF YOU REMAIN ELIGIBLE OR YOUR BENEFITS WILL BE TERMINATED. (FOOD STAMP MANUAL CITATION: 106 CMR:364.400)

YOUR RIGHT TO A FAIR HEARING:

YOU HAVE THE RIGHT TO REQUEST A FAIR HEARING IF YOU DISAGREE WITH THIS ACTION. IF YOU ARE REQUESTING A HEARING, YOUR FOOD STAMP BENEFITS WILL BE REINSTATED AT THE CURRENT AMOUNT IF YOUR APPEAL IS RECEIVED BY THE DIVISION OF HEARINGS WITHIN 10 DAYS OF THE DATE AT THE TOP OF THIS PAGE. IF YOUR APPEAL IS DENIED, THE DEPARTMENT HAS THE RIGHT TO RECOVER FROM YOU ANY ADDED BENEFITS WHICH YOU RECEIVED DURING THE APPEAL PROCESS. YOU MAY STILL APPEAL THIS ACTION AFTER TEN DAYS, BUT YOU MUST DO SO WITHIN 90 DAYS OF THE DATE AT THE TOP OF THIS PAGE. OTHERWISE, YOUR REQUEST FOR A FAIR HEARING AFTER THAT DATE WILL BE DENIED. TO REQUEST A FAIR HEARING, YOU MUST SIGN AND DATE THE ENCLOSED CARD ON WHICH YOUR NAME AND ADDRESS ARE PRE-PRINTED AND MAIL IT TO: DIVISION OF HEARINGS, P.O. BOX 167, ESSEX STATION, BOSTON, MA 02112. IF YOU HAVE QUESTIONS CONCERNING THE CORRECTNESS OF YOUR BENEFITS COMPUTATION OR THE FAIR HEARING PROCESS, CONTACT YOUR LOCAL WELFARE OFFICE. YOU MAY FILE AN APPEAL AT ANY TIME IF YOU FEEL THAT YOU ARE NOT RECEIVING THE CORRECT AMOUNT OF FOOD STAMPS.

benefit reductions or terminations based upon the notice. The court rejected the motion for a temporary restraining order on December 31, 1981.

In March, 1983, following a two day trial the district court concluded that the December notice was constitutionally inadequate because it failed to provide the recipients with sufficient notice of the benefit reduction, was untimely, was incomprehensible to many of the recipients, and did not include financial data for each individual recipient. The district court ordered the Department to restore benefits lost due to the change in earned income deduction. Specifically, the court ordered the Department to restore benefits lost between January 1, 1982 and the date the recipient received adequate notice, had his benefits terminated for a reason unrelated to the change in the earned income deduction, or had his file recertified.[2] The district court also ordered that all future food stamp notices issued by the Department include various data, including

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2. Applications for food stamps are approved, or certified, for discrete periods of time known as "certification periods". These periods run from one to twelve months. 7 U.S.C. § 2012(c). At the expiration of the certification period the recipient's entitlement to food stamp benefits lapses. In order to continue to receive benefits the recipient must file a new application and once again demonstrate eligibility. This process is referred to as "recertification." See Banks v. Block, 700 F.2d 292, 295 (6th Cir. 1983).

The state was not informed by the court that its December notice was inadequate until the district court issued its order on March 24, 1983. By that time the files of all recipients with earned income had been recertified. Thus the practical effect of the district court's order was to require supplementary benefits for the period between January 1, 1982 and the recertification of the recipients' files.

the old and new benefit amount, and that the Department issue regulations, subject to court approval, governing the form of future food stamp notices.

On appeal defendants contend that the notice issued by the Department satisfied constitutional requirements and that the district court abused its discretion in ordering the restoration of benefits and the promulgation of new notice regulations.

I. Adequacy of Notice

Before applying due process analysis a court must find that there has been a deprivation of life, liberty, or property. Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972). The government defendants argue that these food stamp recipients were not deprived of property because they were entitled only to that level of benefits authorized by statute. Since the December reductions merely reduced benefit levels in accord with a statutory mandate, the government argues that food stamp recipients had no further entitlement to the original higher level of benefits. Observing that recipients had no entitlement to or property interest in the original benefit level after the statutory change, the government concludes that recipients were not deprived of any property when their benefits were reduced and that, therefore, due process analysis is inapplicable to the reduction and termination of these recipients' food stamp benefits.

This argument has some surface appeal but its limitations may best be illustrated by imagining the consequences of its adoption. If no one could claim a property interest or entitlement that in any

way exceeded statutory authorization, then very few public assistance recipients would be entitled to the protections of due process. Whenever the government moves to reduce or terminate benefits it does so because it believes that the recipient has received more than the statute authorizes. Under the government's rationale these recipients would not be entitled to due process because they could claim no property interest in any benefits exceeding those authorized by statute. This situation would, of course, place recipients in an untenable position: the only recipients with a property interest would be those whose reductions exceeded those required by statute, but no one could know who these were if there was no opportunity for notice, objection, and redetermination.

Our own view, placing the argument of the government in proper perspective, is as follows. Public distributive programs are subject to majority action, i.e., Congress, which can increase, decrease, and terminate benefits. So long as the programs exist, people have the right to participate in accordance with the established ground rules. When it can be said that there is no further right because there is nothing in which to participate, then it must also follow that at that point there is no property interest. To the extent, however, that an individual's right to participate in accordance with preestablished ground rules still exists and that government action may possibly have adversely affected that right to participate, it must follow that there remains a property interest.

Although no other court has explicitly so addressed this question, the notion that statutory reductions infringe a protected

property interest appears to have been uniformly accepted by courts considering statutory modifications in federal public assistance programs. E.g., Garrett v. Puett, No. 82-5214, slip op. at 3 (6th Cir. June 2, 1983) (due process analysis applied to notice announcing statutorily mandated reduction in A.F.D.C. benefits); LeBeau v. Spirito, 703 F.2d 639, 643-44 (1st Cir. 1983) (due process analysis applied to notice announcing statutorily mandated reduction in A.F.D.C. benefits); Banks v. Trainor, 525 F.2d 837, 841 (7th Cir. 1975), cert. denied, 424 U.S. 978 (1976) (due process analysis applied to notice announcing statutorily mandated reduction in food stamp benefits); Velazco v. Minter, 481 F.2d 573, 576-78 (1st Cir. 1973) (due process analysis applied to notice announcing statutorily mandated changes in old age assistance benefits); Philadelphia Welfare Rights Organization v. O'Bannon, 525 F. Supp. 1055, 1058 (E.D. Pa. 1981) (due process analysis applied to notice announcing statutorily mandated reduction in food stamp benefits); Willis v. Lascaris, 499 F. Supp. 749, 755 (N.D. N.Y. 1980) (due process analysis applied to notice announcing statutorily mandated reduction in food stamp benefits). Accordingly, we conclude that the district court properly found that in recalculating the benefits of these food stamp recipients the Department infringed a property interest subject to the full protection of the Fourteenth Amendment.

Having found that the benefit reduction deprived food stamp recipients of property, the district court proceeded to analyze whether the recipients had been afforded due process. Applying the balancing test first enunciated in Mathews v. Eldridge, 424 U.S.

319, 335 (1976), the court found that the private interest involved, the right to food stamps, is very important; that there was substantial risk of erroneous deprivation owing to the need for an individual determination of each recipient's income and expenses at a time when there was a data processing backlog at the Department's computer facility; that the risk of error was enhanced by the content of the notice, which did not specify the amount of the benefit reduction or whether the benefit was being reduced or terminated; that the notice contained insufficient information to allow a recipient to determine if an error had been made; that additional safeguards would reduce the risk of error and would be of great value; and that the government's interest in not providing meaningful notice is minimal. Thus the court concluded that the Department had failed to provide recipients with constitutionally sufficient notice.

In reaching its conclusion the court noted not only that the content of the notice was deficient, but that the form of the notice was constitutionally inadequate owing to its unfamiliar language, poor composition, small print, exclusive use of capital letters, and excessive line length. Additionally, the district court found that the Department had failed to comply with the notice requirements of the Food Stamp Act, 7 U.S.C. § 2020(e)(10), and its accompanying regulations, 7 C.F.R. §§ 273.12(2)(ii) & 273.13(a).

The district court's findings of fact are reviewable only for clear error. E.g., Fed. R. Civ. P. 52(a); Fortin v. Commissioner of Mass. Dept. of Public Welfare, 692 F.2d 790, 794 (1st Cir. 1982). The same standard of review applies in this circuit to mixed questions

of law and fact. E.g. Lynch v. Dukakis, No. 82-1884; slip op. at 19 (1st Cir. October 12, 1983); Sweeney v. Board of Trustees, 604 F.2d 106, 109 n.2 (1st Cir. 1979), cert. denied, 444 U.S. 1045 (1980) ("This circuit has applied the clearly erroneous standard to conclusions involving mixed questions of law and fact except where there is some indication that the court misconceived the legal standards." (citations omitted)). See Pullman Standard v. Swint, 465 U.S. 273 (1982); Holmes v. Bateson, 583 F.2d 542, 552 (1st Cir. 1978).

In concluding that the December notice failed to provide constitutionally adequate notice, the district court applied the appropriate legal standard, the Mathews balancing test. Our task, therefore, is limited. We may reverse the district court's conclusion only if our review of the entire record leaves us with the "definite and firm conviction that a mistake has been committed". United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).

Our review of the record reveals ample support for the court's conclusion that the December notice was difficult to read, relatively difficult to comprehend, ambiguous (in that it indicated only that benefits would be reduced or terminated), and that it lacked the specific information necessary to allow recipients to determine if a calculation had been made. Certainly we find no indication that the court committed clear error.

The district court required the provision of specific notice because it found that there was a high likelihood that recipients' benefits would be miscalculated as a result of the statutory change

in the earned income deduction. The government challenges this conclusion, pointing out that the change in benefits was executed by a simple change in the Department's computer program. The computer was simply instructed to ignore eighteen instead of twenty percent of the recipients' earned income. Since this process did not require the collection or entry of any new recipient data, the government argues it was really the simplest change imaginable.[3] As long as the computer was correctly reprogrammed, all of the new benefit amounts would be correct. If the computer was incorrectly reprogrammed, all of the benefits would be wrong. Thus the government argues both that the risk of error in this situation is very low, and that any errors that do occur should be obvious. Therefore, the government contends that specific individual notice should not have been required.

While the government's position is appealing in theory, we do not find clearly erroneous the district court's conclusion that there was substantial risk of calculation error. The district court found that the notices were prepared and mailed at a time when there was a significant data processing backlog at the Department's computer facility. As a result of this backlog the files of some recipients did not contain accurate information. The government admits that application of the new calculation formula to inaccurate data would

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3. The government distinguished this situation, which merely involved the application of a new calculation formula to pre-existing file data, to an initial determination of eligibility, which involves the collection and verification of new data. The government contends that the risk of error is significant in the latter situation, but not in the former.

result in an erroneous benefit payment. The recipients in this case, who were advised only that their benefits would be reduced or terminated, had no way of knowing whether their benefits had been correctly computed or whether an error had been generated by the use of inaccurate or out-dated data. Moreover, this was a very confusing time for many of the recipients owing to concomitant changes in other federal assistance programs. Given these circumstances it was not unreasonable for the district court to conclude that the December notice was inadequate. These recipients may have been well informed about their right of appeal, but they did not have enough information to know whether or not to exercise that right.

The district court's conclusion that the risk of error was significant may have been influenced by the results of a random sample of the files of 5,013 households that received the December notice. That sample revealed that the notice was mistakenly sent to 585 households with no earned income and that the benefits of 211 of these households were erroneously altered. In addition, thirteen other households with earned income received the notice even though their benefits were not affected. We repeat this finding only to demonstrate that a number of errors did occur, the simple ministerial nature of the change notwithstanding.

In affirming the court's conclusion that the December notice was constitutionally inadequate, we stress the limited scope of our review and the combination of factors and circumstances that prompted

the district court to require more specific notice.[4] We note, too, that while the court's judgment is consistent with that rendered by other courts faced with challenges to similar notices, e.g., Banks v. Trainor, 525 F.2d 837 (7th Cir. 1975), cert. denied, 424 U.S. 978 (1976); Philadelphia Welfare Rights Organization v. O'Bannon, 525 F. Supp. 1055 (E.D. Pa. 1981), the court did not go as far as have other courts in requiring specific notice, see, e.g., Dilda v. Quern, 612 F.2d 1055 (7th Cir.), cert. denied sub. nom., Miller v. Dilda, 447 U.S. 935 (1980) (State agency implementing benefit reduction required to supply each A.F.D.C. recipient with a copy of the agency worksheet used to recalculate recipient's benefits)..

In addition to finding the notice unconstitutional the district court ruled that "the December notice violated the advance notice requirements of 7 U.S.C. section 2020(e)(10) and 7 C.F.R. section 273.12(e)(2)(ii)". The court also found that the notice had to comport with the requirements of 7 C.F.R. section 273.13(a).

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4. The government relies on our decisions in LeBeau v. Spirito, 703 F.2d 639 (1st Cir. 1983) and Velazco v. Minter, 481 F.2d 573 (1st Cir. 1973) in arguing that the December notice exceeded constitutional requirements. While those decisions indicate that the requirements of due process are flexible and may vary depending on circumstantial factors, they do not support the notion that due process analysis is inapplicable to the mass change context. In LeBeau this court merely suggested that a notice substantially more specific than that challenged here satisfied constitutional standards. Velazco involved statutory changes to a number of public assistance programs, which resulted in a net increase in benefits. In that situation we indicated that due process required only that recipients receive notification regarding their right to appeal. Our conclusion was influenced by our determination that requiring additional notice would delay implementation of the benefit increase. 481 F.2d at 578. The situation presented in this appeal is, of course, quite different and calls for the application of a different standard.

We agree that the notice failed to meet statutory requirements, but find that the notice was not required to comply with the dictates of 7 C.F.R. § 273.13(a). 7 C.F.R. § 273.13(a) requires state agencies to provide individual notice of any "adverse action" at least ten days before the action will become effective and specifies the information a "notice of adverse action" must contain. But these requirements are not applicable to this food stamp reduction because section 273.13(b)(1) exempts mass change notifications from the requirements of § 273.13(a).

Although these recipients were not entitled to a "notice of adverse action" as that term is defined in § 273.13(a), they were entitled to meaningful advance notice. 7 U.S.C. § 2020(e)(10) implies that advance notice of any benefit reduction is required in the mass change context. The statute explicitly allows state agencies to provide notice "as late as the date on which the action become effective" if the benefit reduction was instigated by the state's receipt of "a written statement containing information that clearly requires a termination or reduction . . . [of] benefits", but it appears to require the provision of advance notice in all other circumstances.[5] Any ambiguity in the statute is resolved by 7 C.F.R.

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5. 7 U.S.C. § 2020(e)(10) provides, in part, that:

> "[A]ny household which timely requests . . . a fair hearing after receiving individual notice of agency action reducing or terminating its benefits within the household's certification period shall continue to participate and receive benefits . . . except that in any case in which the State agency receives from the household a written statement containing information that

§ 273.12(e)(2)(ii) which provides, in part, that "[a] notice of adverse action is not required when a household's food stamp benefits are reduced or terminated as a result of a mass change in the public assistance grant. However, State agencies shall send individual notices to households to inform them of the change". The district court found the December notice unconstitutional because the notice failed to convey meaningful information to affected recipients. We believe the notice failed to satisfy statutory requirements for the same reason -- the notice in question failed to inform recipients. We doubt that Congress intended a constitutionally deficient notice to satisfy the statutory notice requirement and thus we affirm the district court's conclusion that the December notice failed to satisfy the notice requirements of 7 U.S.C. § 2020(e)(10) and 7 C.F.R. § 273.12(e)(2)(ii). See Philadelphia Welfare Rights Organization v. O'Bannon, 525 F. Supp. 1055, 1061 n.7 (E.D. Pa. 1981.)

II. Remedy

Finding that the December notice failed to provide constitutionally sufficient notice, the district court ordered the restoration of benefits pending delivery of constitutionally adequate notice, termination of the recipient's participation in the food

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(cont.)

> clearly requires a reduction or termination of the household's benefits, the State agency may act immediately to reduce or terminate the household's benefits and may provide notice of its action to the household as late as the date on which the action becomes effective."

stamp program for reasons unrelated to the change in the earned income deduction, or expiration of the recipient's certification period. The court also ordered the Massachusetts Commissioner of Public Welfare to include specified data in future food stamp notices and to draft and submit for approval new regulations governing the form of such notices. We believe the district court erred in ordering such wide ranging relief.

The restoration of benefits to all recipients was unwarranted, given the absence of any showing that a substantial percentage of these recipients had their benefits improperly reduced or terminated. Restoration of benefits would constitute a windfall to recipients and would result in the continuation of benefits at a level exceeding that authorized by Congress. Nor would a policy of restoration provide any incentive to state agencies to give adequate notice in the future. Since the federal government finances the food program (except for 50 percent of the program's administrative costs, which are paid for by the states), states giving inadequate notice would merely find themselves ordered to restore the original, higher level of benefits at the expense of the federal government. State agencies might even find this an attractive possibility, inasmuch as it would have the net effect of temporarily protecting the state's recipients from the effect of statutory benefit reductions. Courts must design remedies that will encourage the states to carry out Congress' intent and provide constitutional notice. A policy of wholesale benefit restoration might frustrate that goal.

Superficially, the most appropriate way to remedy a constitutionally inadequate notice would be to order the provision of adequate notice. Unfortunately, this solution would not be helpful in the present situation. The state implemented the benefit reduction challenged here in January, 1982. It would be very difficult, if not impossible, to provide the affected recipients with meaningful, understandable notice at this late date. Most likely such a notice, which would have to refer to events and figures almost two years old, would merely confuse recipients.

Rather than require recipients to decipher yet another notice and exercise their right to appeal, we believe it makes more sense to require the Department of Public Welfare to check its files to ensure that the Department properly calculated the benefit reduction of each recipient with earned income. If the Department finds that a recipient's benefits were improperly recalculated, it should provide the recipient with any benefits due for the period beginning January 1, 1982 and ending on the date the recipient's file was next recertified or the recipient's participation in the food stamp program was terminated for reasons unrelated to the change in the earned income deduction, whichever occurred first.[6] The district court should ensure that the state's review of its files is thorough and

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6. The state defendant argues that the district court's order requiring the restoration of benefits violates the Eleventh Amendment's prohibition on the recovery of money damages from the states. Since the cost of the food stamp program is borne by the federal government, we see no Eleventh Amendment bar to ordering the restoration of benefits. The state may incur some administrative costs, if it has to restore benefits, but these should be de minimis.

accurate and it may wish to solicit the views of counsel on how this may best be accomplished.

In short, we are substituting this opportunity for review of the Department's calculations for the opportunity a proper notice would have afforded recipients. This procedure, which was suggested as an alternate remedy by the state on appeal, is not a perfect substitute for the provision of constitutional notice. But it will result in the restoration of benefits wrongfully reduced while placing the burden of the state's error on the state where it belongs. At this juncture that appears to be the most we can accomplish.

Although the state's notice was inadequate, we find nothing in the record to indicate that the Department acted in bad faith. We have no reason to doubt that the state will strive to provide constitutional notice in the future. Indeed, we note that our court has already suggested that the state supplied adequate notice in a very similar situation involving statutory reductions in the Aid to Families with Dependent Children (AFDC) program. LeBeau v. Spirito, 703 F.2d 639 (1st Cir. 1983). Accordingly, we conclude that the district court placed an improper and unnecessary burden upon the Department when it specified the form of future notices and required the submission and promulgation of new notice regulations.

The judgment of the district court is affirmed in part, reversed in part and remanded for proceedings consistent with this opinion. Each party shall bear its own costs on appeal.

Adm. Office, U.S. Courts — Blanchard Press, Inc., Boston, Mass.

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

KAREN FOGGS, ET AL., Plaintiffs	)	
v.	)	CIVIL ACTION NO. 81-0365-F
JOHN R. BLOCK, ET AL., Defendants	)	

CORRECTED ORDER

April 6, 1983

FREEDMAN, D.J.

The Court hereby amends its Order dated March 24, 1983, Page 2, Paragraph No. 2 to read as follows (amendment is underlined):

"2. Defendants are hereby ordered to return forthwith to each and every household in the plaintiff class all food stamp benefits lost as a result of the action taken pursuant to the December notice for the period between January 1, 1982 and the earliest of the following:"

It is So Ordered.

Frank H Freedman
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUS. TS

FILE COPY

KAREN FOGGS, ET AL,
Plaintiffs

v.

CA 81-0365-F

JOHN R. BLOCK. ET AL,
Defendants

JUDGMENT

In accordance with the Court's Memorandum and Order entered March 24, 1983, it is hereby ordered and adjudged that judgment be entered for the plaintiffs.

George F. McGrath
Clerk

March 25, 1983

John C. Fleckenbruch
Deputy Clerk

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UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

KAREN FOGGS, ET AL., Plaintiffs	)	
v.	)	CIVIL ACTION NO. 81-0365-F
JOHN R. BLOCK, ET AL., Defendants	)	

ORDER

March 24, 1983

FREEDMAN, D.J.

This matter is before me on plaintiffs' motion for a preliminary injunction consolidated with a trial on the merits. Based upon my review of the evidence presented by the parties through affidavits and the testimony at the trial, and after careful consideration of the arguments of the parties, both orally and in their memoranda, and in accordance with the Findings of Fact and Conclusions of Law of even date, I am issuing this Order.

1. It is hereby declared that the December notice did not comport with the constitutional requirements of due process because:

a. It did not contain the individual recipient's old food stamp benefit amount, new benefit amount, or the amount of earned income that was being used to compute the change;

b. It did not tell its recipients whether

they were being reduced or terminated;

c. It was written at such a level of difficulty and in such a format as to be incomprehensible to many of its recipients; and

d. It was not timely.

2. Defendants are hereby ordered to return forthwith to each and every household in the plaintiff class all food stamp benefits lost as a result of the action taken pursuant to the December notice for the period between January 1, 1981 and the earliest of the following:

a. The month next following the date the household was recertified for participation in the food stamp program;

b. The date the household was terminated or withdrew from participation in the food stamp program for reasons not related to the change in the earned income disregard; or

c. The date that the household receives a legally sufficient notice regarding the change in the earned income disregard.

3. Defendant Spirito is hereby ordered to draft and issue regulation(s) containing specific standards to ensure that all future food stamp notices of reduction or termination are written and printed so as to be understandable to recipients of those notices, provided however that:

a. Such regulation(s) be drafted and submitted to this Court (upon notice to plaintiffs' counsel) for approval within forty-five days of entry of judgment herein; and

b. The regulations shall not be issued prior to approval by the Court.

4. It is hereby declared that all food stamp notices of reduction or termination of benefits must be mailed at least ten days before the proposed action and must contain at least an explanation of the reason and the specific citation for the proposed action, the benefit amount after the proposed action, and sufficient information to allow the recipient of such a notice to determine whether an error has been made.

5. Defendant Spirito is hereby enjoined from reducing or terminating the food stamp benefits of any household participating in the food stamp program without first sending to that household at least ten days before the proposed action, a notice that includes at least:

a. An explanation of the reason for the proposed action;

b. The specific citation that supports the proposed action;

c. The benefit amount prior to the proposed change;

d. The benefit amount after the proposed change;

e. Sufficient information to allow the recipient to determine whether an error has been made; and

f. The effective date of the proposed action.

6. It is hereby declared that the December notice violated the provisions of 7 C.F.R. Section 272.4(c)(3) because it was mailed out only in English and Spanish.

7. It is hereby declared that the current multi-lingual notice card being used by defendant Spirito as an insert in certain food stamp notices does not comport with the requirements of 7 C.F.R. Section 272.4(c)(3)(ii)(B) because it does not contain:

a. All of the languages currently required for food stamp notices in Massachusetts; and

b. A summary of the purposes of the notices it accompanies; and

c. A telephone number to call for more information.

8. Defendant Spirito is hereby enjoined from terminating or reducing the food stamp benefits of any household that is a member of a single-language minority entitled to notice in its native language pursuant to 7 C.F.R. Section 272.4(c)(3)(i) or (ii) unless that household is provided with a notice in its native language that comports with the requirements of 7 C.F.R. Section 272.4(c)(3)(ii)(B).

9. It is hereby declared that plaintiffs are the prevailing party in this action and are entitled to an award of attorneys' fees pursuant to 42 U.S.C. Section 1988; the amount thereof to be determined by the parties, or by this Court upon appropriate motion therefor to be filed within sixty days of entry of judgment herein.

It is So Ordered.

Frank H. Freedman
United States District Judge

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UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

KAREN FOGGS, ET AL., Plaintiffs	)	
v.	)	CIVIL ACTION NO. 81-0365-F
JOHN R. BLOCK, ET AL., Defendants	)	

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

March 24, 1983

FREEDMAN, D.J.

This is a motion for a preliminary injunction consolidated with a trial on the merits. Plaintiffs' central claim is that the notice given to the plaintiff class as a result of the Omnibus Budget Reconciliation Act of 1981 was constitutionally insufficient because it did not contain certain required information and because it could not be understood by the plaintiff class. Defendants' response is that the notice given complies with the requirements of due process.

Based upon my review of the evidence presented by the parties through affidavits and the testimony at the trial, and after careful consideration of the arguments of the parties, both orally and in their memoranda, and with due regard for the proposed order submitted, I am entering

the following findings of fact and conclusions of law.

I. FINDINGS OF FACT

1. The Food Stamp Act of 1977 was amended on August 13, 1981, inter alia, to reduce the earned income disregard for food stamp households from twenty percent to eighteen percent.

2. The Secretary of Agriculture promulgated regulations providing that the changes in the earned income disregard be implemented no later than ninety days from October 1, 1981.

3. At the end of November 1981, the Department of Public Welfare (hereinafter referred to as "the D.P.W.") issued a notice (hereinafter referred to as "the November notice") to 19,654 food stamp households in the State of Masssachusetts in an effort to implement the change in the earned income disregard. The notice was written in English and Spanish.

4. The November notice was entitled "IMPORTANT NOTICE--READ CAREFULLY" and informed recipients of changes in the Federal Food Stamp Law. Specifically, recipients were informed that the earned income deduction was lowered from twenty percent to eighteen percent. The notice contained a citation to the relevant Massachusetts regulations and described the recipients' appeal rights.

5. Recipients could appeal by signing and dating the form enclosed with the November notice and

returning it to the address listed on the notice, or by orally requesting an appeal by telephone or in person.

6. On December 10, 1981, plaintiffs commenced this action challenging the legal adequacy of the November notice.

7. On December 16, 1981, this Court certified this action as a class action on behalf of all food stamp households in the State of Massachusetts which received the November notice and issued a temporary restraining order enjoining any reductions or terminations of benefits based upon said notice. The Court commented that the November notice was deficient in that it failed to provide recipients with a date to determine the time within which they could appeal.

8. As a result of the temporary restraining order, all eligible recipients whose benefits were reduced pursuant to the November notice had their December benefits restored to their previous levels.

9. The D.P.W. restored the recipients' benefits by mailing supplemental benefits (Authorization to Purchase, hereinafter "A.T.P.") to approximately 16,640 recipients in the amount of the December reduction.

10. On or about December 24, 1981, the D.P.W. issued a second notice (hereinafter "the December notice") in English and Spanish dated December 26, 1981 to approximately 16,640 food stamp recipients with earned

income. This notice was sent in an effort to implement the change in the earned income disregard by January 1, 1982. The D.P.W. later extended the timely appeal period until January 5, 1982 and notified the recipients of the December notice that their benefits would be reinstated if their appeal was received by that time.

11. The first page or yellow card of the December 26, 1981 notice was entitled "IMPORTANT FOOD STAMP NOTICE, READ CAREFULLY" and it explained to recipients what effect the temporary restraining order would have on their benefits and their appeal rights.

12. The second page or orange card of the December notice was almost identical to the November notice. It again informed the recipients of the changes in the Federal law with regard to the earned income deductions. The notice again described the recipients' appeal rights.

13. In order to appeal, recipients had to either sign and date the form enclosed with the December notice and return it to the address listed on the notice or to orally request an appeal by telephone or in person.

14. The federal government pays the full cost of all food stamp benefits. The federal government reimburses the State for fifty percent of the State's cost in administering the program.

15. By January 6, 1982, 331 members of the

plaintiff class had filed an appeal from either the November or December notices.

16. Appeals filed by January 6, 1982 from either notice were considered timely. Thus, those recipients who filed appeals by January 6, 1982 continued to receive their higher benefits pending appeal.

17. In total, 403 recipients appealed from the November and December notices of reduction.

18. If a recipient filed an appeal after January 6, 1982, the reduction took effect. If, after a hearing, the appeals referee determined that the reduction was improper, benefits were restored back to the date of reduction.

PLAINTIFFS

19. Several members of the plaintiff class testified at trial.

20. Cecelia Johnson, a named plaintiff in this action, was a recipient of food stamps from the D.P.W. on behalf of her two grandchildren in November and December of 1981. Ms. Johnson filed an appeal on December 7, 1981, and a hearing was held on this appeal on January 29, 1982. She received a continuation of the former level of benefits during the pendency of her administrative appeal.

21. Ms. Johnson testified at trial. She has a Bachelor's Degree from Springfield College and a Bachelor's Degree from American International College.

She is employed as a mental health worker by the Massachusetts Department of Mental Health and has been employed in the past as a supervisor with the Division of Employment Security.

On December 2, 1981, Ms. Johnson received the November notice. She testified at trial she was not able to determine after reading the card whether her food stamps were being reduced or terminated so she called her social worker. Ms. Johnson testified that the social worker was unable over the telephone to explain things to her so Ms. Johnson went to see her in person. Ms. Johnson did not find out from visiting the social worker in person whether her food stamps were being reduced or terminated.

A few days after receiving the November notice, Ms. Johnson received another notice from the D.P.W. informing her that her food stamps were going to be reduced because her income had changed when, in fact, her income had not changed. Later in December of 1981, Ms. Johnson received the December notice in question. Upon receipt of the December notice, Ms. Johnson read it. She testified that she found it difficult to read because of the referencing on page 1 to page 2. She testified she was unable to understand the notice.

Ms. Johnson filed an appeal from the November and December notices and a hearing was held on January 29, 1982. Following the hearing, the appeals referee rendered

the decision voiding any reduction or termination of Ms. Johnson's food stamp benefits.

22. Plaintiff Gill Parker is and was in December of 1981 a recipient of food stamps, and he testified at trial. Mr. Parker completed the eleventh grade in school. He is not regularly employed although he is, on occasion, utilized by the Springfield Public Library as a game technician. In December 1981, Mr. Parker received the December notice and was not able to understand it after reading it several times. Mr. Parker testified he had to resort to the use of a magnifying glass to read the print.

23. Plaintiff Gill Parker filed an appeal on December 9, 1981. His benefits were not reduced as the result of the challenged notices. Prior to receiving notices, Mr. Parker was receiving $72.00 in food stamp benefits, and after his recertification in December 1981, Mr. Parker began receiving $106.00 in food stamp benefits.

24. Stephanie Zades, a plaintiff in this case, was a recipient of food stamp benefits from the D.P.W. in December 1981. Ms. Zades is a high school graduate and was employed as a manager of the Electronics Department for Child World. In late December 1981, Ms. Zades received the December notice in the mail. Ms. Zades testified that she tried to read the December notice but only got part way through because the print was too small

for her to be able to read it and because it was so confusing she could not understand it. Ms. Zades tertified she called her social worker at the D.P.W. but the social worker was of no help. Ms. Zades then sought legal assistance regarding the notice, and on advice of counsel, filed an appeal.

25. Ms. Zades filed an appeal on January 5, 1982. A combined hearing on Zades' food stamp reduction and A.F.D.C. proposed termination was held on February 25, 1982. The D.P.W. appeals referee ordered the D.P.W. to determine if Zades received the proper amount of food stamp benefits during the period November 1981 through February 1982, and if a loss occurred, to restore the benefits. Following the hearing, the food stamp benefits lost to Ms. Zades based on the December notice were to be restored to her.

26. Plaintiff Madeline Jones is and was in November and December of 1981 a recipient of food stamps from the D.P.W. Ms. Jones is 62 years old and a high school graduate. She is employed on a part-time basis as a Senior Aide in the Assessing Department of the City of Boston.

27. In early December 1981, Ms. Jones received the November notice. She was unable to understand this notice so she filed an appeal. In late December 1981 or early January 1982, Ms. Jones received the December

notice. On February 22, 1982, Ms. Jones had her hearing concerning the November and December notices and in March 1982, she received a decision denying her appeal.

COMPREHENSIBILITY

28. Readability studies consist of quantitative statistical formulas and qualitative analysis. These are used to predict the reading difficulty of a given written passage.

29. The Dale-Chall and Fry tests analyze the reading difficulty of a given passage in terms of a reading grade level score, which is not the same as actual grade placement.

30. For example, a grade level score of 5-6 for a given passage indicates that students who tested at the fifth or sixth grade levels on a standardized reading test can answer correctly approximately seventy-five percent of the multiple choice questions put to them on that passage. Thus, a grade level score does not indicate total comprehension. Further, people who read at a fifth or sixth or grade level may have completed fewer or more than that number of years of school.

31. Using the Dale-Chall formula analysis, page one of the December notice tested objectively at a reading grade level of 9-10 and page two of that notice tested objectively at a grade reading level of 11-12.

32. The most widely used reading formula, the

Dale-Chall test, is a two-prong test based upon a list of three thousand so-called "familiar" words known in reading by at least eighty percent of children in the fourth grade in 1948, and average sentence length.

33. All words in a given reading sample not appearing on the Dale list of familiar words are considered unfamiliar. The same unfamiliar word is counted each time it appears in a given example. The number of unfamiliar words is a key factor in determining the level of difficulty of a given passage using the Dale-Chall test.

34. Dr. Culliton, defendants' expert, applied the Dale-Chall reading formula to page one of the December notice (yellow card) and determined it had a readability level of between eighth and tenth grade.

35. Dr. Conard, plaintiffs' expert, applied the Dale-Chall reading formula to page one of the December notice (yellow card) and determined that it had a reading ability level of between ninth and tenth grade.

36. Dr. Culliton applied the Dale-Chall reading formula to page two of the December notice (orange card) and determined that it had a readability level of between ninth and tenth grade.

37. Dr. Conard applied the Dale-Chall reading formula to page two of the December notice (orange card) and determined that it had a readability level of between

eleventh and twelfth grade.

38. Included in the list of unfamiliar words, and therefore influencing the reading level predicted by the Dale-Chall test for page two of the December notice are the following: within, division, recent, federal, benefit, benefits, eligibility, eligible, appeal, reduced, reduction, deduction, request, action, local, welfare, percent, disagree, terminated, computation, contact, enclosed, current.

39. Using the Fry Graph analysis, page one of the December notice tested objectively at a reading grade level of eleven and page two of that notice tested objectively at a reading grade level of twelve.

40. Using the Flesch formula, page one of the December notice tested objectively as fairly difficult (like a quality magazine) and page two of that notice tested objectively as difficult (like an academic journal).

41. Using the Fogg formula analysis, page one (yellow card) of the December notice tested objectively at a reading grade level of 15.2 and page two (orange card) of that notice tested objectively at a reading grade level of 14.4.

42. Each of the class members who appeared before the Court testified that they were confused by the

fact that the November notice did not say whether their benefits were to be reduced or terminated. The December notice contained the same language.

43. Based on information retrieved from the United States Census Bureau's 1976 Survey of Income and Education, the most recent and accurate information of its kind available, 45.8 percent of all heads of Massachusetts food stamp households with earned income have not completed high school.

44. Based on United States Census Bureau figures from the 1976 Survey of Income and Education, 82.2 percent of all heads of Massachusetts food stamp households with earned income have a twelfth grade education or less.

45. Among all Massachusetts food stamp households, 50.2 percent of the heads of those households have not completed high school.

46. Among all Massachusetts food stamp households, 81.7 percent of the heads of those households have a twelfth grade education or less.

47. Dr. Conard, plaintiffs' expert, and Dr. Culliton, defendants' expert, were in agreement that qualitative or subjective factors have to be taken into account in arriving at a meaningful conclusion regarding the difficulty level of a given written passage.

48. The reader's background, interest, and

motivation in the subject matter play an important role in determining comprehensibility.

49. Those readers who have no interest or background in the subject of certain reading material may find little meaning in it; for other readers who were interested in the subject, the same material may be most comfortable reading. This difference in ease of reading and comprehension may exist even though both groups of readers have completed the same years of schooling and have the same general reading ability on a standardized reading test.

50. In Dr. Conard's qualitative analysis of the challenged notices, she determined that the following words were critical to the understanding of the notices: A.T.P., benefits, appeal, certification, recertified, federal, percent, denied, division, department, welfare, requests.

51. Dr. Bendick, plaintiffs' expert, testified that the following words or phrases contributed to the difficulty of the notices: "Your right to a fair hearing," "reinstated," "the earned income deduction has been lowered from 20 percent to 18 percent," "terminated," and "appeal is denied."

52. All food stamp households must have an interview with a D.P.W. caseworker prior to initial certification and at all recertifications.

53. As part of the interview process, the caseworker must fully advise households of their rights and responsibilities under the Food Stamp Program.

54. Households are recertified at various intervals from three months to one year.

55. At the initial certification, and all subsequent recertifications, households must complete an "Application Form." Contained in the application form are the words action, apply, eligible, benefits, deductions, information, fair hearing, disagree, hearing, eligibility.

56. At the time of certification and all recertification, households are given a "change of report form." Contained in the change of report form are the words eligible, received, deductions, benefits, fair hearing.

57. Prior to the end of a certification period, households receive a "notice of food stamp termination form" explaining that they must reapply for benefits and of their right to request a fair hearing. Contained in the notice of food stamp termination form are the words termination, eligible, eligibility, department, welfare, fair hearing, benefits.

58. After a household has been recertified, it receives a notice entitled "notice of eligibility/re-certification" which explains in detail the households' appeal rights using much of the same terminology contained

in the challenged notice. The words certify, recertification, A.T.P., fair hearing, appeal, eligible, eligibility, department, welfare are contained in this notice.

MULTI-LINGUAL NOTICE

59. The challenged notices were written in English and Spanish.

60. It is not known how many members of the plaintiff class do not understand English or Spanish but there is at least one.

LEGIBILITY

61. The December notice was typed on a standard office typewriter, then photoreduced to approximately one half that size and printed on orange and yellow stock cards.

62. Standard office typewriters generally use either pica or elite type. Pica is ten points; elite is twelve points. A point is equal to 1/72 of an inch.

63. The December notice was photoreduced so that the size of the print on the card was equivalent to between 6 points and 5.75 point type which is between 2 to 5 points smaller than the type size generally considered acceptable for text copy.

64. The length of the lines in the December notice are from two to three times longer than that which is considered acceptable for text copy.

65. There was no extra spacing between the lines of print on the December notice. Considering the size of the point used and the line length, there should have been two points of additional line spacing. The spacing between the letters on the December notice was inconsistent and overlapping due to the fact that the notice was produced by photoreducing typewriter copy.

66. Only the English language version of page one of the December notice was printed in capital and lower case letters, while the Spanish language version of page one and both versions of page two of the notice were printed in all capital letters.

67. The production quality of the December notice includes the following: page one is overinked, creating black spots in the text, while page two is underinked, resulting in a grey copy.

68. The December notice was printed in sans serif type.

CONTENTS

69. The December notice did not apprise its recipients of what their food stamp benefit amount was prior to the proposed action that was to be taken.

70. The December notice did not apprise its recipients of what their new food stamp benefit amount would be after the proposed action was taken.

71. The December notice did not notify its

recipients of the amount of earned income that the D.P.W. was utilizing in recalculating their food stamp benefits.

72. Without being given the old food stamp benefit amount, the proposed new food stamp benefit amount and the amount of earned income utilized by the D.P.W. to recalculate the food stamp benefits, recipients of the December notice could not determine whether or not a mistake had been made in their individual cases.

73. The December notice did not tell recipients whether their benefits were being reduced or being terminated.

ADMINISTRATIVE CONSIDERATIONS

74. The D.P.W. was notified in September 1981 by the United States Department of Agriculture ("U.S.D.A.") that major changes in the Food Stamp Program and the A.F.D.C. Program would have to be in effect by October 1, 1981. The U.S.D.A., however, permitted a December 1, 1981 implementation for the Food Stamp Program changes.

75. There are groups of at least 100 food stamp households within specific food stamp individual certification office areas which speak the same non-English language, which do not contain an adult fluent in E.S.L. and whose primary non-English language is one of the following: Armenia, Chinese, French (Haitian), Greek, Italian, Polish, Portugese (Cape Verdian), Russian,

Spanish, or Vietnamese.

76. The Food Stamp Program changes required the development of new D.P.W. policies, procedures, and regulations.

77. Massachusetts change notices are issued by a computer within the Bureau of Systems Operation ("B.S.O."). The B.S.O. is a state agency separate from the D.P.W.

78. The B.S.O., a division of the Massachusetts Department of Administration and Finance, provides all of the systems and operations for the D.P.W., including computer operations and computer programming.

79. Included within the systems and operations provided by the B.S.O. for the D.P.W. is the computer programming required for the generation of food stamp A.T.P.'s and notice address cards as well as various reports concerning the operation of the Food Stamp Program, including the 902 reports.

80. On October 29, 1981, the B.S.O. received a formal written request from the D.P.W. to modify the computer programs to implement a change in the earned income disregard effective with the December A.T.P.'s.

81. In November 1981, there was a shortage of B.S.O. computer programmers. In addition, during that time, B.S.O. was involved in three other major projects.

82. If, in its formal written request to B.S.O.

to implement the earned income disregard change, the D.P.W. had indicated that it wanted B.S.O. to program the computer to include on the address slip the affected household's old benefit amount, new benefit amount, and earned income amount, it is likely the B.S.O. would have been able to program the computer to do so without causing any delay in the date on which the earned income disregard changes became operational or in the date by which the notices of that change were mailed out.

83. On or about December 18, 1981, the B.S.O. received a verbal request from the D.P.W. to program the computer to generate supplemental A.T.P.'s reinstating the food stamp benefits to all households which were adversely affected by the November notice. As part of this D.P.W. request concerning the issuance of supplemental A.T.P.'s, the D.P.W. also asked the B.S.O. to generate a set of address slips for the December notice, which was to be sent to all households receiving supplemental A.T.P.'s. The D.P.W. did not ask the B.S.O. to include on that address slip the affected household's old benefit amount, new benefit amount, or earned income amount.

84. If, at the time the D.P.W. asked the B.S.O. to generate the A.T.P.'s and address slips, the D.P.W. had asked the B.S.O. to include on the address slips the affected household old benefit amount, new benefit amount, and earned income amount, it is likely the B.S.O. would

have been able to do so without any delay in the date by which the supplemental A.T.P. notices were sent. Programming the computer to provide individual information concerning a household's change in food stamp benefits is neither a difficult nor burdensome process.

85. It is administratively feasible to draft notices of reduction and termination in public assistance programs at a fifth-sixth reading grade level.

86. A notice of change in benefit amounts that provides the old benefit level, the new benefit level, a precise statement of the reason for the nature of the change, and sufficient information to allow its recipient to determine whether the proposed action is correct operates to benefit the agency because such a notice should reduce the amount of client visits and phone calls to the agency seeking clarification, reduce the amount of unnecessary appeals, and free up the time of the caseworkers for other tasks.

87. It is unclear whether the D.P.W. caseworkers were able to provide clients with explanations of either the November or December notices.

ERROR RATE

88. The defendants set forth that the approximate error rate for the issuance of food stamp benefits is 13 percent. Of the 13 percent, approximately 11 percent are overpayments to recipients, and 2 percent are

underpayments.

89. Approximately 16,000 food stamp households were sent the December notice.

90. The specific earned income of a given household was a factor in determining the amount of that household's benefit reduction as a result of the change announced in the December notice.

91. Of approximately 16,000 households sent the December notice, 9,191 were participants in the monthly income reporting system ("M.I.R.S.").

92. The computer utilized by the B.S.O. for the implementation of the earned income disregard change and the issuance of food stamp A.T.P.'s received the raw data on those households participating in the M.I.R.S. directly from the M.I.R.S. computer via a magnetic tape.

93. In October, November, and December 1981, there was a backlog in the M.I.R.S. data entry system.

94. Approximately two thirds of all data entries scheduled for the M.I.R.S. in October were not processed and the backlog was not corrected until the last week in December 1981.

95. For any of the 9,191 M.I.R.S. food stamp households which reported any change in their household circumstances including changes in income in October or November 1981, it was more likely than not that the information was not entered into the M.I.R.S. computer

and, therefore, was not transmitted to the B.S.O. computer prior to the implementation of the change in the earned income disregard.

96. If a reported change in family circumstances which affects the household food stamp benefits is not entered on a timely basis into the M.I.R.S. computer, the A.T.P. issued by the B.S.O. computer will be in error.

97. Because of the substantial data entry backlog in the M.I.R.S. in October, November, and December 1981, the likelihood of error with respect to any M.I.R.S. household affected by the change in the earned income disregard was increased.

98. The computer which the D.P.W. utilized to implement the change in the earned income disregard generated a 902 C Report listing each food stamp household which received the December notice.

99. For each household which received the December notice, the 902 C Report listed that household's name, address, old food stamp benefit amount, new food stamp benefit amount, and earned income.

100. The 902 C Report contained approximately 16,000 food stamp households.

101. A random sample of 5,013 of the approximately 16,000 cases listed on the 902 C Report showed 585 cases in which a household was listed as having

no earned income.

102. Of the 585 households in the random sample with no earned income, 211 were listed as experiencing a change in benefits.

103. The random sample of 5,013 cases shows that 13 households in the sample were listed as having earned income but no changes in benefits.

104. Therefore, according to the random sample of the 902 C Report, there were 585 cases with no earned income, 211 cases with no earned income but with a change in benefits, and 13 cases with earned income but no change in benefits.

105. The random sampling of the 902 C Report only identified errors which logically flowed from the fact that the reductions or terminations of benefits were based upon a change in the earned income disregard.

106. A separate 903 Error Report was issued by the Bureau of Systems Operation identifying those food stamp cases which the computer was not able to adjust due to missing information or information which was not allowed in computer calculation. Those households identified on the 903 Error Report did not receive the challenged notices; they received notices mailed out by caseworkers.

107. It was error for the D.P.W. to send the December notice to the 585 households in the sample with

no earned income, to change the benefits of the 211 households with no earned income, and to send the December notice to 13 households in the sample with earned income but no change in benefit level.

108. Any time the D.P.W. determines that a household has not received the total benefits to which it was entitled during the preceding twelve months, the D.P.W. recalculates the benefits and restores to the household any lost benefits.

109. At the time of trial, all but 193 members of the plaintiff class had been recertified or had their cases closed.

110. By the end of December 1982, all members of the plaintiff class who had had their cases recertified were closed and their benefits redetermined because the longest period of certification is twelve months.

CURRENT D.P.W. PROCEDURES WITH RESPECT TO MASSACHUSETTS CHANGE NOTICES

111. All Massachusetts change notices under the Food Stamp Program currently have the old household's benefit amount and new benefit amount on the name and address card.

112. The D.P.W. now sends with all Massachusetts change notices under the Food Stamp Program, a multi-lingual card in eight languages stating: "IMPORTANT NOTICE! HAVE TRANSLATED IMMEDIATELY."

II. CONCLUSIONS OF LAW

1. Pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure, this Court ordered the consolidation of the hearing on plaintiffs' motion for a preliminary injunction with the trial of the action on the merits, and treated the motion for a preliminary injunction as a request for a permanent injunction.

2. Plaintiffs' central claim is that the notice provided to the plaintiff class did not comport with the due process requirements of the Fourteenth Amendment to the United States Constitution.

3. In determining the merits of the plaintiffs' procedural due process claim, a court must make two inquiries. First, it must determine whether the plaintiffs have been deprived of a property interest which is entitled to Fourteenth Amendment protection. Second, once a constitutionally protected property interest has been identified, it must be determined what process is due.

4. It is clear that the entitlement to food stamp benefits is a property interest subject to the full protection of the Fourteenth Amendment. Goldberg v. Kelly, 397 U.S. 254 (1970). Therefore, given the existence of a constitutionally protected property interest, the question is what process is due.

5. In Mathews v. Eldridge, 424 U.S. 319 (1976),

the Supreme Court set forth three factors that should be considered by any court determining what administrative procedures are constitutionally sufficient: (1) the private interests that will be affected by the official action; (2) the risk of any erroneous deprivation of such interests through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the Government's interests including any fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

6. Addressing the first of the three factors outlined in Mathews, supra, I find the private interests of the plaintiffs which are affected to be extremely significant ones. Food is a necessity of life, and the purpose of the food stamp program is to provide low-income households with the resources to purchase a minimally adequate supply of food. 7 U.S.C. Section 2011; United States Department of Agriculture v. Moreno, 413 U.S. 528 (1973). Because accurate calculations enable persons who are on the margin of subsistence to obtain a minimally adequate diet; by definition, a miscalculation of even a portion of the household food stamp allotment would leave the household with insufficient resources to procure the necessities of life. The slightest change in the household food stamp allotment threatens the well-being and dignity of its members. Willis v. Lascaris, 499

F.Supp. 749 (N.D. N.Y. 1980); Goldberg v. Kelly, 397 U.S. 254 (1970).

7. Next, the risk of an erroneous deprivation of benefits flowing from the reductions and terminations announced in the December notice must be considered, along with the probable value, if any, of additional or substitute procedural safeguards.

8. The calculation of food stamp benefits under the income method requires an individualized determination of income, expenses, and deductions for each recipient. This type of calculation creates substantial risks of erroneous deprivation. Banks v. Trainor, 525 F.2d 837 (7th Cir. 1975), cert. denied, 424 U.S. 978 (1976); Willis, 499 F.Supp. at 757.

9. In the case at hand, there was confusion in the D.P.W. and the B.S.O. during the latter part of 1981 when the massive changes were being implemented, and there was a substantial data entry backlog in the M.I.R.S. in the months of October, November, and December of 1981. These problems increased the likelihood of error.

10. As a result of a random sampling of households which received the December notice, several errors were discovered. It was error for the D.P.W. to send the December notice to 585 households in the sample with no earned income, to change the benefits of 211 households with no earned income and to send the December

notice to 13 households in the sample with earned income but no change in benefit level.

11. The risk of erroneous deprivation of benefits is increased in this case by the lack of adequate notice. The December notice did not inform the affected food stamp households of the exact action being taken, that is, whether their food stamp allotment was being reduced or terminated. There was no mention of the amount by which the benefits were being reduced. And finally, the December notice lacked the information necessary to enable the household to determine if an error had been made. Therefore, without the relevant information to determine whether an error had been made, the risk of an erroneous deprivation is increased.

12. The probable value of additional or substitute procedural safeguards in the case at hand is great. If the recipients were provided with sufficient individual information to determine if an error had been made, it would allow each recipient to correct any errors prior to suffering a deprivation. See Philadelphia W.R.O. v. O'Bannon, 525 F.Supp. 1055 (E.D., Pa. 1981).

13. It is unclear from the record the possible monetary loss to those households affected by the December notice. However, since the inquiry involves food stamp benefits, even if the implementation of the act involved only a slight change in food stamp allotments, this change

affects the household's ability to procure an amount of food which has been determined to be minimally adequate. Therefore, any reduction in a minimal subsistence level is significant.

14. The next factor to be considered is the government's interest in not providing an adequate notice. Generally, the government's interest in a case such as the case at hand is the conservation of scarce fiscal and administrative resources. Although administrative cost and convenience is not the controlling weight in determining whether or not due process requires a procedural safeguard, it is a factor that must be weighed. Mathews v. Eldridge, 424 U.S. 319 (1976). However, in the case at hand, the Commonwealth does not argue the conservation of scarce fiscal resources but rather sets forth the administrative problems existing at the time of the implementation of the Omnibus Budget Reconciliation Act in Massachusetts. The Commonwealth argued that there was a shortage of B.S.O. computer programmers in November of 1981, and during that time, the B.S.O. was involved in three major other projects. The defendants do not argue that the cost of making a constitutionally adequate notice is overwhelming, but rather argue that it was not administratively possible at the time the notices were sent to make a constitutionally adequate notice.

15. I find the defendants' argument of time

pressure neither persuasive nor controlling. First, Massachusetts negotiated a time extension from the federal government so that the change in the earned income disregard would not have to be implemented until December 1, 1981. Furthermore, the explicit federal regulations issued on September 4, 1981 stated that the earned income disregard payments need not be implemented before January 1982. It seems that the time pressures that the D.P.W. felt regarding the November notice were self-created. This Court imposed no time constraints on the issuing of the December notice.

16. The governmental interest in not providing an informative notice is minimal at best. I cannot see any real hardship to the defendants in requiring that an informative and clear notice of the reduction or termination of food stamps be given to the plaintiff class. The provision of an informative notice would actually benefit the Commonwealth as meaningful errors will be brought to its attention. The appeals taken from the December notice could not possibly be the result of discovered errors.

17. In the balance, I hold that the notice given by the Commonwealth is constitutionally deficient. The private interest of each individual recipient is significant, the risk of erroneous deprivation is high with the probable value of additional procedural

safeguards great, and the government's interest is minimal.

18. Due process is flexible and calls for such procedural protection as the particular situation demands. Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Mathews v. Eldridge, 424 U.S. 319, 334 (1976).

19. In Mullane v. Central Hanover Trust Company, 339 U.S. 306 (1950), the court declared that in order to comply with the strictures of the Constitution, a "notice must be of such nature as reasonably to convey the required information . . ." "[t]he means employed must be such as one desirous of actually informing the [recipient] might reasonably adopt to accomplish it." Id. at 315.

20. The nature of the language and the format of the notice was not reasonably designed to convey the information contained. Although food stamp recipients are generally familiar with the terms used in the notice, the composition of the notice made it very difficult to understand especially considering the education level of most recipients. Furthermore, the very small print, the use of capitals and line lengths served to increase the difficulty of reading and understanding the December notice.

21. Moreover, the December notice did not inform the affected food stamp households of the exact action being taken, or the amount by which their benefits

were being reduced, and it did not provide the information necessary to enable the household to determine if an error had been made. The notice of reduction or termination of need-based public assistance benefits must, at a minimum, inform the recipient of the actual amount of the benefits being taken away and the relevant information necessary to ascertain whether an error has been made. Philadelphia W.R.O. v. O'Bannon, 525 F.Supp. 1055, 1060-61 (E.D. Pa. 1981). In the case at hand, the recipients were not even informed whether they were being terminated or reduced.

22. The December notice violated the timely advance notice requirements of 7 U.S.C. Section 2020(e)(10) and 7 C.F.R. Section 273.12(e)(2)(ii).

23. The notice required to implement the change in the earned income disregard had to comport with the requirements of 7 C.F.R. Section 273.13(a).

An appropriate Order shall issue.

Frank H. Freedman
United States District Judge

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIV. NO. 81-0365-F

KAREN FOGGS, et al., Plaintiffs -against- JOHN R. BLOCK, et ano., Defendants	ORDER OF CLASS CERTIFICATION AND TEMPORARY RESTRAINING ORDER

Upon the Complaint and plaintiffs' Motion for Class Certification and a Temporary Restraining Order and the Affidavits in support thereof, and following oral argument at which all parties were heard, it is found that:

1. Approximately nineteen thousand (19,000) households received the notice challenged herein, and their joinder in this action would be impracticable;

2. There are issues of fact or law common to each of the households receiving said notice; specifically, whether the notice provided sufficient information to comport with the requirements of due process and the Food Stamp Act of 1977;

3. The claims of the named plaintiffs are typical of the claims of the rest of the class members;

4. The class will be adequately represented by the named plaintiffs and their counsel;

5. The defendants in sending the notice challenged herein

have acted on grounds generally applicable to the entire class;

6. Plaintiffs have demonstrated that they are likely to succeed on the merits of their claim that the notice is invalid on its face because it does not meaningfully inform recipients of the time within which they must appeal; and

7. Plaintiffs and members of the class certified herein are likely to suffer irreparable injury as a result of the terminations and reductions carried out pursuant to the challenged notice.

THEREFORE, IT IS HEREBY ORDERED that:

1. This action be certified as a class action pursuant to Federal Rule of Civil Procedure 23(b)(2) on behalf of a class of all persons residing in the Commonwealth of Massachusetts who received food stamps prior to December 1, 1981 and who have had or are threatened with having their food stamp benefits reduced or terminated based upon the notice challenged in this action; and

2. Defendant Spirito, his agents, successors, employees and all person acting in concert with them are enjoined from reducing or terminating the food stamp benefits of any class member based upon the notice at issue in this action and are further ordered to immediately reinstate any such food stamp benefits already so terminated or reduced.

Dated: December 17, 1981

Frank H. Freedman
U.S. District Court Judge

United States Court of Appeals

FOR THE FIRST CIRCUIT

No. 83-1270

KAREN FOGGS, ET AL,
Plaintiffs, Appellees,
v.
JOHN R. BLOCK,
Defendant, Appellee,

THOMAS SPIRITO, ETC.,
Defendant, Appellant.

No. 83-1320

KAREN FOGGS, ET AL,
Plaintiffs, Appellees,
v.
JOHN R. BLOCK,
Defendant, Appellant.

JUDGMENT

Entered: December 7, 1983

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows:

The judgment of the District Court is affirmed in part, reversed in part and the cause is remanded to the District Court for further proceedings consistent with the opinion filed this date.

No costs.

By the Court:

Clerk.

FPI 81—7-19-74 5M 2443

[cc: Ms. Janos; Messrs. Forrest and Rae.]